PUBLIC PROSECUTOR v. LAI PONG YUEN & ORS.

[A.Cr.J. (Ismail Khan J.) July 8, 1967]

[Seremban — Criminal Appeal No. 18 of 1967]

Bribery and Corruption — Money paid as gratification — Cautioned statement amounting to confession — Its use in joint trial for same offence — Penal Code ss. 161 & 165 — Prevention of Corruption Act, 1961, s. 9(ii).

Criminal Law and Procedure — Confession — Co-accused, of — Cautioned statement — Joint trial — Same offence.

Evidence — Confession of co-accused — Evidential value — Caution statement amounting to confession — Evidence Ordinance, 1950, s. 30.

In about November 1964 the third respondent had put up two unauthorised buildings on his land within the town council, Seremban and received notices from the said public body to demolish them. In February 1965 it was alleged he saw the second respondent who was deputy president of the Town Council about it and he gave him $200 as deposit for the council for "things to be in order", payment was by cheque.

Despite this, he received sometime later another notice from the council requiring him to demolish the buildings. He then approached the first respondent who was president of the said council, who after inspection of the buildings asked him and received from him a further deposit of $2,500 which was paid by cheque undated but endorsed on the back. After this cheque was paid a change of policy by the town council took place — the council would not carry out the demolition orders but it would summon the owners instead.

These facts led to police investigation which resulted in joint trial of the three respondents in the sessions court, Seremban on the following charges: (a) the first respondent as president of council received gratification of $2.500 for preventing the performance of an official act an offence under section 9(ii) of the Prevention of Corruption Act, 1961, alternatively bribery under sections 161 and 165 of the Penal Code; (b) the second respondent was similarly charged in respect of $200 which he received; (c) the third respondent was charged with two offences of offering inducement to prevent performance of an official act under section 9(ii) of the Prevention of Corruption Act.

At the trial the prosecution made use of cautioned statements taken from the third respondent which being self-inculpatory implicated the second respondent but in respect of first respondent said the $2,500 was a loan to him. All three accused were acquitted without their defence being called.

Held: (1) as to the first respondent the evidence was circumstantial and it did not point irresistably to his guilt;

(2) in regard to the second respondent there were gaps and omissions in the prosecution evidence, which only the cautioned statements could fill. As the trial was not a joint trial of the respondents for the same offence the cautioned statement was precluded from being taken into consideration against the second respondent;

(3) as there was inconsistency and contradictions between the two cautioned statements themselves and with the other evidence in the case the rejection of the cautioned statements as confession was justified.

Per Curiam: A confession of a co-accused is only an element in the consideration of other evidence, which evidence must be sufficient to support a conviction. . . . Unlike the confession of a co-accused, a confession by an accused can be used against himself, and if believed could lead to a conviction. But the rule of prudence requires that there should be independent corroboration. In assessing the weight to be given to a cautioned statement it is necessary to consider the character of the statement itself, the circumstances in which it was made and the previous statements of the accused.

Cases referred to:—

(1) *Raju & Ors.* v. *R.* [1953] M.L.J. 21.

(2) *Bhuboni Sahu* v. *The King* A.I.R. 1949 P.C. 257.

(3) *Kashmira Singh* v. *State of Madhya Pradesh* A.I.R. 1952 S.C. 159; [1952] S.C.R. 526.

(4) *Gunadhar Das* v. *State* A.I.R. 1952 Cal. 618.

CRIMINAL APPEAL.

Abdul Razak bin Dato' Abu Samah (Deputy Public Prosecutor) for the appellant.

D. R. Seenivasagam for the first respondent.

Edgar Joseph Jr. for the second respondent.

V. C. George for the third respondent.

Cur. Adv. Vult.

Ismail Khan J.: The respondents were jointly tried by the sessions court, Seremban, on the following charges.

The first respondent was charged that as president of the Town Council, Seremban, a public body, he accepted gratification in the sum of $2,500 as inducement "for preventing the performance of an official act, namely, the summary demolition of two temporary buildings at 348, Jalan Hose, Seremban", an offence punishable under section 9(ii) of the Prevention of Corruption Act, 1961. He was also charged in the alternative with bribery under section 161 and section 165 of the Penal Code.

The second respondent was charged that he as deputy president of the Town Council, Seremban, a public body, accepted gratification in the sum of $200 as inducement "for preventing the performance of an official act, namely, the summary demolition of two unauthorised buildings at 348, Jalan Hose, Seremban", an offence punishable under section 9(ii) of the Prevention of Corruption Act. There were two charges in the alternative against him for bribery under section 161 and section 165 of the Penal Code.

The third respondent was charged with offering to the president of the Town Council, Seremban, a public body, gratification in the sum of $2,500 "as inducement for preventing the performance of an official act, namely, the summary demolition of two temporary buildings at Jalan Hose, Seremban", an offence punishable under section 9(ii) of the Prevention of Corruption Act. He was also charged with offering to the deputy president of the Town Council gratification in the sum of $200 as an inducement for preventing the performance of an official act, namely, the summary demolition of two unauthorised buildings at Jalan Hose, Seremban, an offence punishable under section 9(ii) of the Prevention of Corruption Act.

According to the prosecution, on 12th May, 1965, the third respondent saw one Chin See Yin, a former Town Councillor, and gave him this story. Some time in November, 1964, he had put up two unauthorised buildings on his land at Jalan Hose and had received notices from the Town Council to demolish them. In February, 1965, he saw the second respondent who said that if he gave him a sum of $200 as a deposit for the Town Council "things would be in order". He then paid him the $200 by cheque. However, some time later, he received another letter from the Town Council requiring him to demolish the buildings. He saw the first respondent who said he would look into the matter. On receiving another similar letter from the Town Council about the two buildings, he informed the first respondent. The latter inspected the two buildings and asked for a further deposit of $2,500. He gave him a cheque for the amount leaving the date blank but at the former's request endorsed it at the back. At the suggestion of Chin See Yin he instructed his solicitor Mr. Ramachandran to write to the Town Council. The letter (P19) stated that the third respondent had made two payments of $200 and $2,500 respectively by way of deposit in respect of the temporary buildings and was given the assurance that no further action would be taken in the matter of the two buildings. Mr. Gurdial Singh, the secretary of the Town Council, said in evidence that he saw both the first and second respondents about the letter but they denied any knowledge of the contents. At a committee meeting on 5th May, 1965, it was decided that notices should be served on the owners of unauthorised buildings. On 13th May, 1965, it was resolved at a meeting of the full Council not to carry out the demolition orders but to summon the owners instead.

The next witness, Mr. Rintoul, said he had advised the Council that the buildings be demolished but the president did not appear to fall in with his views.

The document examiner from his examination and comparison of the specimen signatures of the first, second and third respondents said that the cheque for $2,500 (P23) bore the signature of third respondent and his endorsement at the back. There was nothing in it to connect it with the first respondent. He was satisfied that the cheque for $200 (P22) was drawn by the third respondent and endorsed by the second respondent.

The health inspector for the Town Council said he found two unauthorised sheds at Jalan Hose the property of the third respondent.

The investigating officer Santokh Singh in the course of his investigations collected the two cheques (P22 and P23) from tthe Oriental Bank. On 27th May, 1965, he took a cautioned statement (P56) from the third respondent. In that statement, which was self-inculpatory, he implicated the second respondent but said that the $2,500 was a loan to the first respondent. Another cautioned statement taken on 10th January, 1966, was to the same effect.

That was the evidence at the close of the case for the prosecution.

The learned president acquitted and discharged all three respondents without calling for the defence.

This appeal is against the acquittal.

The grounds of appeal that call for consideration may be summarised as follows:—

As regards the first respondent there was evidence that he had accepted the sum of $2,500 corruptly from the following circumstances. The date in the cheque P23 was left blank. The third respondent was served with notices to demolish his sheds. The Council had however decided on 13th May, 1965, to institute proceedings in court instead. The learned Legal Adviser argued on these lines. Bearing in mind that the evidence is only circumstantial, it is difficult to see how such evidence could point irresistibly to the guilt of the respondent. The learned Legal Adviser must have seen the difficulty he was in at the trial when he sought to bring in evidence of system which was refused, in my view rightly. There was no evidence *aliunde* that the first respondent had received the sum of $2,500 to warrant the introduction of evidence to show that it was corruptly received, or to rebut the defence that it was for an innocent purpose. (See *Raju & Ors.* v. *R.*[1]).

I now come to the next point. The learned Legal Adviser contended that in the case of the second respondent there is the evidence of his signature on the back of the cheque P22. This, together with evidence of the change in the policy of the Town Council regarding unauthorised buildings and the cautioned statement would be sufficient to establish a *prima facie* case against him.

It is true that the learned president had admitted the cautioned statement, but he attached no weight to it. Assuming however that it had any weight at all, its use as regards the second respondent would depend upon a strict adherence to the provisions of section 30 of the Evidence Ordinance, 1950, which reads:—

> "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession."

Without the cautioned statement the case against the second respondent would rest only on the evidence:—

(1) of the cheque P22;

(2) of the demolition notices in respect of the two sheds of the third respondent;

(3) of the decision of the Town Council not to proceed with their demolition but only to institute proceedings against their owners.

Such evidence by itself would not be sufficient to my mind to support a conviction. There is no evidence of how the cheque came to be endorsed by the second respondent or, if it was given to him, of the circumstances in which it was done, or for what purpose. It is necessary to have recourse to the statement to fill the gap in the prosecution case. But this is not open to the prosecution.

It is clear from a long line of authorities that a confession of a co-accused is only an element in the consideration of other evidence, which evidence must be sufficient to support a conviction. In the case of *Bhuboni Sahu* v. *The King*,[2] Sir John Beaumont said at page 260:—

"The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction is correct."

The effect of section 30 of the Evidence Ordinance was considered by the Supreme Court of India in the case of *Kashmira Singh* v. *State of Madhya Pradesh*.[3] There, Bose J. after reviewing some of the leading authorities on the point said:—

"Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing that without the aid of the confession he would not be prepared to accept."

In a later case, *Gunadhar Das* v. *State*,[4] Sir Trevor Harries C.J. said:—

". . . . the correct direction appears to me to be that the confession may be used to corroborate the other evidence. In short, the conviction must be based on the other evidence. The confession can only be used to help to satisfy a court that the other evidence is true. What the learned judge has suggested is that if the other evidence suggests to the court that the confession of the co-accused is true, then a conviction can be based on the confession. That appears to me to be an incorrect statement of the law."

There is another ground for the exclusion of the cautioned statement in the case of the second respondent. An essential requirement for the application of section 30 is the joint trial of the respondents for the same offence. The expression "same offence" means identical offence. (See *Sarkar* on Evidence, 10th ed., p. 299). All the three respondents were charged for offences under section 9(ii) of the Prevention of Corruption Act. The offences alleged against the first and second respondents were on different dates. The cautioned statement implicates only the second respondent. Moreover, there were charges in the alternative under sections 161 and 165 of the Penal Code against the first two respondents. There was therefore no joint trial for the same offence, for the purpose of section 30 of the Evidence Ordinance.

Lastly, it was argued by the learned Legal Adviser that the third respondent should have been called for his defence in view of his confession in the cautioned statement and the other evidence led by the prosecution. Unlike the confession of a co-accused, a confession by an accused can be used against himself, and if believed could lead to a conviction. But the rule of prudence requires that there should be independent corroboration. The learned president has however rejected the confession altogether. In assessing the weight to be given to the cautioned statement it is necessary to consider the character of the statement itself, the circumstances in which it was made and the previous statements of the third respondent. When he first saw P.W.1, he told him he paid the money to the first and second respondents in each case as a deposit for his two sheds so that "things would be in order". Although no such deposit was required for the two sheds, there is evidence that it has been the practice in the Town Council to take deposits in respect of unauthorised sheds for certain purposes. The letter sent to the Town Council (P19) on his instructions confirms that the money was by way of deposit. However, when he next met P.W.1 he said the money paid to the first and second respondents was a bribe. He then wrote to his solicitor denying that he had given him instructions to write to the Town Council. His cautioned statement was made on 27th May, 1965, to the investigating officer Santokh Singh, wherein he went back on his statement to P.W.1. This time he said the money paid to the respondent was a loan for the purpose of building his new house. He maintained that what was paid to the second respondent was a bribe.

This cautioned statement was followed by another made to inspector Yuen on 10th January, 1966. Here, he repeated that he had given the money to the second respondent as a bribe. But he admitted in this statement that in his interview with another solicitor, whom he intended to engage in the place of his former solicitor, he had denied having made any allegations of corruption against the "Town Council officials".

In view of the conduct of the third respondent and the discrepancies in his statements, the learned president was justified in not attaching any value to his confession.

There is no substantial evidence apart from the confession against the third respondent.

In the result the appeal is dismissed.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons; Joseph & Son; W. H. Tan & George.*

MENON v. THE BROOKLANDS (SELANGOR) RUBBER CO. LTD.

[O.C.J. (Raja Azlan Shah J.) July 18, 1967]
[K.L. — Civil Suit No. 699 of 1967]

Master and Servant — Wrongful dismissal — Estate conductor — Disobeying lawful and reasonable orders — Summary dismissal of estate conductor — Whether justified.

The plaintiff claimed damages for wrongful dismissal. The plaintiff was employed by the defendants as an estate conductcor in division II of the estate since 1960. For the first five days of 1965 there were discrepancies between the net weights of latex from his division of the estate and the weights at the main factory. This would clearly reflect upon the way he was performing his duty as conductor.

The manager of the estate wrote a letter on January 6, 1965 after pointing out the shortcomings of his work, warned him against further carelessness and negligence. The plaintiff refused to acknowledge receipt of it on a copy. This refusal was reported to the manager, who directed the assistant manager to write the plaintiff a letter instructing him to see the manager personally at an appointed time. This was duly done but the plaintiff did not comply. Two more requests were made to him to see the manager before the plaintiff complied with the manager's wish to see him.

At the interview the plaintiff being shown the warning letter again refused to sign the copy when requested. The manager therefore, suspended him from his duties on that same day January 7, 1965.

There were protracted negotiations between the plaintiff's solicitors and the defendants, and later between the plaintiff's union and the defendants. On April 21, 1965 the defendants served the plaintiff with a written notice of dismissal for insubordination with effect from January 8, 1965. The manager in his evidence said that he considered the incidents of January 6, 1965 and January 7, 1965 sufficient to render the plaintiff guilty of misconduct in his employment in that he disobeyed the lawful and reasonable orders of the defendants.

Upon the pleadings two material contentions were raised on behalf of the plaintiff: (a) whether the facts justify summary dismissal; (b) if not was there proper notice for such dismissal.

Held: the refusal to acknowledge receipt of warning letter justified instant dismissal since it goes to the essential conditions of his contract of service which required that he be a diligent and responsible estate conductor. The conduct was inconsistent with his duty towards the master. It was inconsistent with the continued confidence between them essential to the relationship of master and servant. Summary dismissal being justified the question of proper notice was not called for.

Cases referred to:—

(1) *Laws* v. *London Chronicle (Indicator Newspaper) Ltd.* [1959] 2 All E.R. 285, 287, 288.

(2) *Sinclair* v. *Neighbour* [1967] 2 W.L.R. 1.

(3) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, 363, C.A.

(4) *Ridge* v. *Baldwin* [1963] 2 All E.R. 66, 71.

(5) *Savage* v. *British India Steam Navigation Co. Ltd.* 46 T.L.R. 295.

CIVIL SUIT.

Dato' S. P. Seenivasagam for the plaintiff.

R. Khoo for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: The plaintiff claims damages against the defendants for wrongful dismissal. He contends that the dismissal without sufficient reason and without proper notice is wrongful and actionable. The ground of dismissal which is alleged against him in the pleading is misconduct, which in the particulars enumerated in paragraph 4 thereof consisted of wilful disobedience to the lawful and reasonable orders of the defendants in the course of employment and insolence to the defendants' assistant manager in the course of the said employment. Upon the pleadings which I have stated two material contentions were raised on behalf of the plaintiff. Whether the facts justify summary dismissal; if not, was there proper notice for such dismissal.

It is well-established law that wilful disobedience of a lawful and reasonable order of the employer will justify summary dismissal. It is also axiomatic that one act of disobedience or misconduct can justify instant dismissal if it is of a nature which goes to show that the servant is repudiating the contract or one of its essential conditions: see *Laws* v. *London Chronicle (Indicator Newspapers) Ltd.*(1) This point was re-stated in the recent case of *Sinclair* v. *Neighbour.*(2) In that case the manager of a betting-shop, responsible for the conduct of the shop and the employees there, quite deliberately took money out of the till for his own personal purposes in circumstances which he knew quite well his employer, if asked, would not permit. He replaced the money on the following day. The employer, on hearing of what had happened, dismissed him summarily. The Court of Appeal, in reversing the decision of the trial judge, held that the facts justified summary dismissal. Davies L.J. at page 5 of the judgment said:—

"With the greatest respect to the judge, I think that he fell into error in attaching too much weight to the label and not enough to the facts. The facts were established. The fact that the manager took the money from his employer's till behind his back knowing that the employer would not consent was established; and it seems to me that it does not really matter very much whether that justifies the label 'dishonest' or not. The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was